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IN THE

Supreme Court of the United States

October Term, 1969
No. 1096

ROBERT IRVING MCWILLIAMS,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

B. W. MINSKY,
Attorney for Petitioner Robert Irving McWilliams.

Of Counsel:
MINSKY, GARBER & RUDOF,
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IN THE

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No. .....

ROBERT IRVING MCWILLIAMS,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States of America:

The Petition of Robert Irving McWilliams respectfully shows:

I.

STATEMENT OF THE CASE.

Petitioner makes application to this Court for a review of the decision of the Courts of the State of California wherein he was convicted of violating California Penal Code Sections 211 and 245.

Penal Code Section 211 sets forth the crime of robbery, a felony. He was found guilty of robbery in the second degree, the robbery having been perpetrated without any torture or being armed with a dangerous or deadly weapon.

California Penal Code Section 211a.

Section 245 of the California Penal Code is assault by means of force likely to produce great bodily injury, a felony [Clk. Tr. p. 123].

The Opinion of the Court of Appeal of the State of California, Second Appellate District, Division One, was filed on August 28, 1969, and certified for nonpublication in the official reports under the Appellate Rules of the Court, No. 976 (for the Opinion, see Appendix 1).

On October 22, 1969, the Supreme Court of the State of California, sitting in bank, denied Petitioner a hearing after judgment by the Court of Appeal (see Appendix 2).

The remittitur was filed on October 31, 1969, wherein it was ordered and adjudged that the judgment was affirmed and the appeal from the denial of the motion for new trial was dismissed. (See Appendix 3). Petitioner has until January 29, 1970 in which to file said Petition pursuant to law.

II.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF COURT INVOKED.

The judgment in the trial Court in which Petitioner seeks a review was entered on November 4, 1968 in the Superior Court of the State of California, for the County of Los Angeles (See Appendix 3).

On October 31, 1969, the Appellate Court of the State of California affirmed the decision, and it became final on that date. The decision and opinion of the Court of Appeal of the State of California, Second Appellate District, Division One, affirmed the judgment and denied the appeal from the denial of the motion for new trial. This was filed on August 18, 1969.

The Supreme Court of the State of California, the Court of last resort, in the state, denied Petitioner a hearing on October 22, 1969, and filed its remittitur in the Superior Court and said remittitur was entered on October 31, 1969 (See Appendix 3).

As heretofore indicated, Petitioner has until January 29, 1970 in which to file this Petition.

The reason that this Court should grant this Petition is that a State Court has decided a federal question of substance, not in a way applicable with the decisions of this Court, and as a result, has denied Petitioner due process of law.

U.S. Supreme Court, Rule 19 1(a).

III.

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Courts of the State of California commit prejudicial and reversible error in permitting evidence to be introduced during the trial of a field identification by the victim of Petitioner where he was denied his right to have counsel present?

2. Did the California Courts commit prejudicial and reversible error in permitting evidence of the said field identification when the totality of circumstances at the time prejudicially suggested to the victim that Petitioner was the guilty party?

3. Did the California Courts commit prejudicial and reversible error in requiring Petitioner to sit at counsel table during the course of his preliminary hearing (first appearance under California procedure, over Petitioner's objection, thereby suggesting his identity to the witness, against him)?

4. Did the California Courts commit prejudicial and reversible error in refusing to reverse and set aside the judgment of conviction on the ground that Petitioner's privately retained counsel did not adequately represent him at the trial, and as a result, the said trial was reduced to a sham?

IV.

CONSTITUTIONAL PROVISIONS INVOLVED.

1. Amendment V to the Constitution of the United States of America:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

2. Amendment XIV to the Constitution of the United States of America:

> "'. . . nor shall any state deprive any person of life, liberty, or property, without due process of law."

V.

STATEMENT OF FACTS.

On March 25, 1968, at 3:30 a.m., Amelia Villalpando stopped her car at Second and Mott Streets, in the City of Los Angeles [Clk. Tr. p. 19].

She got out of the car to look at the tire she thought was going flat [Clk. Tr. p. 19]. A person she identified as Petitioner stopped and approached her and told her that she had been disturbing the peace by honking the horn [Clk, Tr. pp. 19-22].

After allegedly conversing with the Petitioner, she reached into her automobile to get her purse. At this time, Petitioner allegedly struck her, threw her to the ground, grabbed her purse, and ran [Clk. Tr. p. 24].

The purse contained fifty dollars in bills—a five, a twenty, two tens and five one dollar bills [Clk. Tr. pp. 25-26].

Miss Villalpando's screams caused the police to be called. On their arrival, "a very short time" after the incident, the officer observed Petitioner carrying a hammer and running toward them between two houses near the place of assault and robbery [Clk. Tr. p. 50]. Petitioner was handcuffed. He asked that the officers "please bring whoever was involved in this so I could talk to him and, you know, let them tell the police that I definitely wasn't the person" [Rep. Tr. p. 114, lines 5-8].

Thereafter, the officers placed Petitioner in the back of their patrol car, turned their domelight on, and brought Miss Villalpando to within ten feet of the car [Rep. Tr. p. 114; Clk. Tr. p. 68].

One of the officers told Miss Villalpando that "We had somebody in the car who might be the suspect and I wanted her to go and take a good look at the man in the back of the police car, and then if she would tell me if that was the man or not" [Clk. Tr. p. 74, lines 4-7].

The officers also indicated to her prior to her viewing Petitioner, that "I thought we had the man" [Clk. Tr. p. 74].

Miss Villalpando identified Petitioner as her assailant [Clk. Tr. p. 70].

Petitioner was searched. In his left pocket was found one twenty, two tens, one five and five one dollar bills. Petitioner also had a wallet in his hip pocket with several bills in it [Clk. Tr. pp. 57-58]. No purse

was found on Petitioner, or was one found in the area. In addition, Petitioner was not wearing the clothes that the victim indicated her assailant wore when she first spoke to the officers [Clk. Tr. p. 62].

Petitioner's defense was that of an innocent bystander. He testified that he happened to be driving by the area and heard a woman scream, armed himself with a hammer, and ran to apprehend the assailant, and while he was so engaged, he was arrested, and the events, as stated herein, took place [Rep. Tr. pp. 110-112].

VI.

STATEMENT AND PROCEEDINGS WHEN ISSUE RAISED.

The Court's Opinion indicated that no objection was raised as to the manner of admissibility of the evidence as to the field identification.

It is submitted that such an objection was made by Petitioner's attorney when he moved to dismiss the action "on the grounds that the identification of the defendant by the victim is a result of a direction on the part of the police officer toward the defendant as a potential suspect and the probable suspect, and here in court the identification is based upon the fact that he was put at the counsel table beside me" [Clk. Tr. p. 75, lines 5-14].

Defendant's counsel went on to say, "I think that identification is tainted and I think the in court identification is similarly tainted," [Clk. Tr. p. 76, lines 3-4].

The dismissal motion was made at the time of the proceedings at the preliminary hearing. The trial of the

matter was an adoption and submission on all of the testimony and proceedings that occurred at the preliminary hearing pursuant to a stipulation [Clk. Tr. p. 89].

Therefore, it is submitted that a timely objection was made, and there was no absence of such an objection as the California Courts so found.

In addition, the California Courts, in reviewing the decision, found that Petitioner requested the officer to bring the victim to him for the purposes of identification. It is submitted that the testimony was as follows:

> "I was asking that they please bring whoever was involved in this so I could talk to him and, you know, let them tell the police that I definitely wasn't the person," [Rep. Tr. p. 114, lines 5-8].

It is submitted that this testimony does not indicate that Petitioner requested the officer to bring the victim to him for the purposes of identification. It was the desire of Petitioner, at that time, to bring all the parties involved together in order to discuss his innocence. The officers then went about a field identification in violation of Petitioner's Constitutional rights without admonishing him of his right to counsel being present during such an event.

That Petitioner was not adequately represented at the time of trial in that evidence was not introduced by Petitioner's counsel which would have negated his motive to commit the crime.

VII.

ARGUMENT.

Point I.

An Individual Suspected of Crime Has a Right to Have His Counsel Present in Any Field Confrontations Arranged by the Police.

United States v. Wade, 388 U.S. 218, 18 L. Ed. 2d 1249, 87 S. Ct. 126 (1967);

Gilbert v. California, 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. (1951).

The *Wade* doctrine does apply to cases such as the one at bar.

Rivers v. United States, 400 F. 2d 935 (1968);

United States v. Kinnard, 294 F. Supp. 286 (1968).

It is submitted that the totality of circumstances of Petitioner's identification were suggestive of his guilt, and therefore, to allow such evidence into the trial, deprived him of a fair trial.

People v. Caruso, 68 Cal. 2d 183, 65 Cal. Rptr. 336, 436 P. 2d 336;

Stovall v. Denno, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. (1967).

On Page 295 of the *Stovall* Opinion, the Court stated as follows:

> "The practice of showing suspects singly to persons for the purpose of identification and not as part of a line-up, has been widely condemned."

It is submitted that the suggestiveness of the officers, as well as the placing of the defendant in a po-

lice car, handcuffed under a spotlight, constitutes a flagrant instance of a violation of Petitioner's rights of due process of law. A less aggravated situation resulted in a reversal in other cases.

United States v. Gilmore, 398 F. 2d 679 (1968);

State v. Cooper (Ohio), 237 N.E. 2d 653 (1968).

The totality of the circumstances present, in the case at bench, rejects the conclusion reached by the California Courts in permitting this testimony to be introduced against Petitioner.

Further, on this point, it is the contention of Petitioner that proper objection was made [Clk. Tr. pp. 75-76].

Point II.

It Was Error to Require Petitioner to Sit at the Counsel Table During His Preliminary Hearing Where There Was a Serious Question of Identity.

Petitioner's attorney did move to permit the preliminary hearing to proceed with Petitioner seated in the Courtroom, and not at the counsel table, in order to avoid the suggestion of identity to the witnesses against him [Clk. Tr. pp. 3-12]. This motion was denied [Rep. Tr. p. 12], and the Court required Petitioner's attorney to produce Petitioner and seat him at the counsel table.

It is submitted that this order of the Court permitted the victim to identify him as the perpetrator of the crimes charged, which brought about a denial to him of due process.

The preliminary hearing under California procedures is the first Court appearance in which the witnesses

against a defendant, and the defendant, appear together. In that Petitioner had already undergone a field identification, he was of the opinion that being innocent, the victim still would not be able to identify him on the first Court appearance.

As a result, through his counsel, a request was made to avoid having him sit in the usual place reserved for a defendant charged with crime. He did this to avoid suggesting to the victim his identity. The Court refused.

It is submitted by this refusal, again, the Courts of the State of California indulged in an unfair act in violation of the identification confrontations as enunciated by this Honorable Court.

Stovall v. Denno, 388 U.S. 293, 295.

The totality of circumstances would again be that defendant was in the spotlight, sitting alone, in the usual place, where all defendants sit, thereby suggesting to the victim that he was the person that committed the crime.

This procedure is unfair and constitutes a violation of defendant's right of due process of law.

Point III.

Petitioner Was Not Adequately Represented in That His Net Worth Was Not Made Known to the Court by His Attorney at Trial.

It is submitted that such evidence would have negated his motive to commit the crime and his attorney, not doing this, failed to adequately represent him.

VIII.

CONCLUSION.

Petitioner requests that this Court grant this Petition for review, in order that the judgments of the Courts of California be reversed, and he be given an opportunity for a new trial in which unfair evidence not be permitted in. The unfair evidence in this instance, which Petitioner contends deprived him of a fair trial, and due process, is that concerning the field identification arranged for by the officers, and further, the requirement of the Court in which he was forced to sit in the place of defendant, thereby, again, suggesting his guilt to the victim.

It is submitted that if this evidence was not permitted in the record, that the outcome of Petitioner's trial would be otherwise.

Respectfully submitted,

MINSKY, GARBER & RUDOF,
By B. W. MINSKY,
Attorneys for Petitioner Robert Irving McWilliams.

APPENDIX 1.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

The People, Plaintiff and Respondent, v. Robert Irving McWilliams, Defendant and Appellant. Criminal No. 16140.

Filed August 28, 1969.

APPEAL from a judgment of the Superior Court of Los Angeles County. Harold C. Shepherd, Judge. Affirmed.

John J. Reynolds for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Thomas E. Warriner, Deputy Attorney General, for Plaintiff and Respondent.

Appellant was charged in count I of an information with a violation of Penal Code section 211 (robbery) and in count II with a violation of Penal Code section 245 (assault by means of force likely to produce great bodily harm). A prior felony conviction (violation of Penal Code section 211) was alleged. Jury trial was waived and by stipulation the matter was submitted on the transcript of testimony at the preliminary hearing and additional testimony offered by the prosecution and defense. Appellant was found guilty of both counts and the prior felony conviction was found to be true. The court fixed the degree of the robbery as "second" and sentenced appellant to state prison. This appeal followed.

Facts

On March 25, 1968, at 3:30 a.m., Amaelia Villalpando stopped her car at Second and Mott Streets in Los Angeles. She got out of the car to look at a tire she thought was going flat. Appellant approached and told her that she had been "disturbing the peace" by honking her horn. Appellant talked to Miss Villalpando for about ten minutes during which time she was able to observe him. Miss Villalpando then reached into her automobile to get her purse. Appellant struck Miss Villalpando, threw her to the ground, grabbed her purse, and ran. The purse contained $50 in bills—"a five, a twenty, two tens, and five ones." Miss Villalpando's screams caused the police to be called. When they arrived "a very short time" after the incident, the officers observed appellant carrying a hammer and running between two houses near the place of the assault and robbery. Appellant was handcuffed. He requested that the police bring the victim "over." The officers placed appellant in the back seat of their patrol car, turned the dome light on and brought Miss Villalpando to within ten feet of the car. One of the officers told Miss Villalpando that "we had somebody in the car who might be the suspect and I wanted her to go and take a good look at the man in the back of the police car and then if she would tell me if that was the man or not." The officer also indicated to her that "I thought we had the man." Miss Villalpando identified appellant as her assailant. Appellant was searched. In his left front pocket were found one twenty, two ten, one five, and five one-dollar bills. Appellant also had a wallet in his hip pocket with several bills in it.

Appellant's defense was that of innocent bystander. He testified that he happened to be driving by the area and heard a woman scream. He armed himself with a hammer and rushed to apprehend the assailant. While he was so engaged, he was arrested and brutalized by the police.

Issues Raised on Appeal

Appellant does not question the sufficiency of the evidence to support his conviction. He claims the following errors: (1) he was denied his right to counsel at the field identification by Miss Villalpando; (2) the circumstances of that identification were prejudicially suggestive of his guilt; (3) he was required over his objection to sit at counsel table during the course of his preliminary hearing hereby suggesting his identity to the witnesses against him; (4) the trial court refused to hear critical defense testimony; and (5) his privately retained defense counsel did not at trial "adequately" represent him. We reject these contentions as contrary to the law and the record.

Right to Counsel at Field Identification

Appellant contends that error of constitutional dimension occurred at his trial. He argues that he was denied a right to counsel guaranteed by the *Wade-Gilbert* rule when after his arrest he was taken to the victim who identified him. Appellant's argument must be rejected. Although the trial of the case occurred after the decisions in *United States v. Wade,* 388 U.S. 218 [18 L. Ed.2d 1149, 87 S.Ct. 1926] and *Gilbert v. California,* 388 U.S. 263 [18 L.Ed.2d 1178, 87 S.Ct. 1951], no objection to the admissibility of the identification testimony was made at the trial. In the absence of such an

objection, the point cannot be raised on appeal. Moreover, appellant's testimony was that he requested the officers to bring the victim to him for the purposes of identification. We cannot accept his counsel's argument that when the officers did what appellant asked them to do they were in some way infringing on his constitutional rights.

Circumstances of Identification

Appellant contends that the circumstances of his identification were suggestive of his guilt so as to deny him a fair trial. (See *People v. Caruso,* 68 Cal.2d 183 [65 Cal. Rptr. 336, 436 P.2d 336].) The contention is not well taken. The argument is barred because no objection to the identification procedure or to the evidence of identification was raised in the trial court. (*People v. Harris,* 1st Crim. 7066, filed July 17, 1969.) There having been no such objection, the trial court was not called upon to determine the facts bearing upon the issue of whether "the totality of the circumstances surrounding" the confrontation of the victim and appellant constituted what is now claimed to be a violation of due process of law. (See *Stovall v. Denno,* 388 U.S. 293, 302 [18 L.Ed.2d 1199, 87 S.Ct. 1967].) Nor do facts that are in the record sustain appellant's burden of establishing that denial of due process. (See *People v. Irvin,* 264 Cal.App.2d 747 [70 Cal.Rptr. 892] hearing denied, Supreme Court, October 3, 1968.) The totality of the circumstances present in the case at bench to the extent it is developed in the record consists of a statement by an officer made to the victim at the scene of the assault and robbery that there "was somebody in the car who might be a suspect and I wanted her to go and take a good look at the man in the back of the

police car and then if she would tell me if that was the man or not" and a statement by the officer that "I thought we had the man." The totality is strikingly similar to that in *People v. Burns,* [a]270 Cal.App.2d .... [75 Cal.Rptr. 676] in which a contention such as that made by appellant here was rejected.

Procedure of Identification at Preliminary Hearing

Appellant contends that because he was required to be at counsel table at his preliminary hearing his identity as the perpetrator of the crimes charged was suggested to the victim in such fashion as to deny him due process. A similar contention has been rejected in *People v. London,* [b]274 Cal.App.2d ..... [..... Cal.Rptr. .....].

Critical Testimony

Appellant argues that the denial by the trial court of a request by the prosecution to permit the hearing through an interpreter of a tape of an inconsistent statement made by a prosecution witness to an investigator for appellant in some way denied him a fair trial. The argument ignores the reality that the investigator testified to the content of the statement. If there was any harm in the action of the trial court in refusing to permit the possible impeachment of the investigator's testimony by admitting into evidence a tape of the conversation made by the investigator, the harm was to the prosecution and not to appellant.

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[a]Advance Report Citation: 270 A.C.A. 263.

[b]Advance Report Citation: 274 A.C.A. 278.

Adequacy of Representation

Appellant's counsel on appeal contends that counsel privately retained by appellant so inadequately represented him at trial as to require that we reverse the judgment. He argues that trial counsel fialed to introduce evidence of appellant's net worth which would have negatived his motive to commit the crime. The contention and its supporting argument are without merit. A reversal for inadequacy of counsel is proper only when the trial has been reduced to a farce or sham. (*People v. Romero,* 263 Cal.App.2d 590 [69 Cal.Rptr. 748].) No such showing has been made by appellant here. At most appellant's argument discloses a disagreement between his present counsel armed with hindsight and his trial counsel. The latter sought to establish lack of motive by evidence of appellant's current employment and income rather than by an inquiry into his wealth. If the law were that, standing alone, a tactical mistake at trial by privately retained counsel could give a defendant a second chance at acquittal, the worst lawyers would undoubtedly be the richest.

The judgment is affirmed. The appeal from the denial of a motion for new trial is dismissed.

Thompson, *J.*

We concur:
Wood, *P. J.*
Lillie, *J.*

Certified for nonpublication in Official Reports under Rule 976.

Wood, *P. J.*
Lillie, *J.*
Thompson, *J.*

CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the preceding is a true and correct copy of an order of this Court, as shown by the records of my office. Witness my hand and the seal of this Court this 6 day of January 1970 A.D.

CLAY ROBBINS, JR., Clerk

By H. Reeves

Deputy Clerk.

(Seal)

APPENDIX 2.

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 1, Crim. No. 16140.

Order Due October 24, 1969, Thompson, *J.*

In the Supreme Court of the State of California, in Bank.

People v. McWilliams.

Filed Oct. 22, 1969.

Appellant's petition for hearing DENIED.

Traynor,
Chief Justice

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 6th day of January A.D., 1970. William I. Sullivan By R. Johnson, Deputy Clerk.

APPENDIX 3.

County of Los Angeles
County Clerk and Clerk of the Superior Court
111 North Hill Street
Mailing Address: P.O. Box 151
Los Angeles, California 90053
Madison 5-3414
October 31, 1969

In re: Superior Court Case No. A-231 298

Defendant and Appellant Robert Irving McWilliams

Dear Sir:

A Remittitur issued by the Court of Appeal, Second Appellate District, State of California, No. 16140, was filed in this office on October 31, 1969, with respect to the above entitled case, wherein it was ordered, adjudged and decreed by said Court that the judgment is affirmed. The appeal from the denial of a motion for new trial is dismissed.

Probation denied.

Sentenced to State Prison.

(Original Sentence: .....

Date .....)

Very truly yours,

William G. Sharp, County Clerk
By P. J. Talmachoff, Chief
P. J. Talmachoff, Chief
Criminal Division

Defendant is in custody at Calif.

( ) on bail.

( ) released on Probation.

PJT:afg